

743
No. 2574

United States
Circuit Court of Appeals
for the Ninth Circuit

M. P. FLEISCHMAN,
Plaintiff in Error,
vs.
JULIUS RAHMSTORF,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District
Court for the Territory of Alaska. Fourth
Judicial Division.

Filed

FEB 26 1915

F. D. Monckton,
Clerk.

No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit

M. P. FLEISCHMAN,
Plaintiff in Error,
vs.
JULIUS RAHMSTORF,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District
Court for the Territory of Alaska, Fourth
Judicial Division.

Due service and receipt of three copies hereof
admitted this 5th day of February, 1915.

G. B. Cowan
Attorney for Defendant in Error.

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Names and Addresses of Attorneys of Record.

G. B. ERWIN, Attorney for Plaintiff and Defendant in Error, Fairbanks, Alaska;

L. R. GILLETTE, Attorney for Defendant and Plaintiff in Error, Fairbanks, Alaska.

In the United States District Court for the Territory of Alaska, Fourth Judicial Division.

No. 1878 Civil.

JULIUS RAHMSTORF,

Plaintiff,

vs.

M. P. FLEISCHMAN,

Defendant.

Praecipe for Transcript of Record.

To Hon. Angus McBride, Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore sued out to said court and include in said transcript the following pleadings, proceedings and papers on file, to-wit:—

1. The style of this Court and cause.
2. Complaint.
3. Summons, with Marshal's return.
4. Demurrer.
5. Order overruling demurrer.
6. Answer.
7. Reply, (Amended).
- 7-a. Plaintiff's Exhibit "C."

- 7-b. Defts. Exhibits 1 & 2.
8. Motion for Judgment on Pleadings.
9. Order overruling Motion for Judgment on Pleadings.
- 9-a Judgment.
10. Bill of Exceptions (containing Findings, &c.)
11. Petition for Writ of Error. (Allowed in blank).
12. Assignment of Errors.
13. Bond.
14. Writ of Error.
15. Citation on Writ of Error.
16. Stipulation as to record.
17. Praecipe.

Kindly prepare said record and deliver the same to the printer, duly indexed, conformably to the stipulation hereto attached and made a part hereof, and with the rules of this Court and of said Circuit Court of Appeals, so as to have the same on file in the office of the Clerk of said Circuit Court at San Francisco, California, on or before the sixth day of March, 1915.

L. R. GILLETTE,
Attorney for Defendant and one of
Attorneys for Plaintiff in Error.

[Title of Court and Cause.]

Stipulation as to Record.

It is stipulated and agreed by and between the parties hereto and their respective counsel as follows:

I.

That in printing the record herein on writ of error to the U. S. Circuit Court of Appeals for the Ninth Circuit, that on all papers subsequent to the complaint, which bear the full title of the court and cause, such title may be omitted except as to the name of the paper or document, and there shall be inserted in lieu thereof the words "Title of the Court and Cause"; further, that in all instances subsequent to the pleadings and process, the endorsements on papers be omitted except the filing and the statement "Acknowledgment of due service attached"; further, that no pleading or paper be printed in the record more than once.

Dated at Fairbanks, Alaska, this 6th day of Jany, 1915.

G. B. ERWIN,
Attorney for Plaintiff,
L. R. GILLETTE,
Attorney for Defendant.

Due and legal service of the within and foregoing Praeipe and Stipulation by receipt of copy thereof, duly acknowledged at Fairbanks, Alaska, this 6th day of January, 1915, and plaintiff joins in the praeipe.

G. B. ERWIN,
Attorney for Plaintiff.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan. 6, 1915. Angus McBride, Clerk.

[Title of Court and Cause.]

Complaint.

The plaintiff for a cause of action against the defendant, complains and alleges:

I.

That on or about the 26th day of May, 1910, and for a long time prior thereto, defendant above named owned and conducted a general merchandise store and business in the town of Rampart, Territory of Alaska, and was on said day the owner of a stock of dry-goods, groceries, provisions, etc. used by him in his said business.

II.

That on said 26th day of May, 1910, defendant sold to plaintiff his said stock of dry-goods, groceries, provisions, etc. and the good will of the said business for the consideration of about Eighteen hundred dollars (\$1,800.00).

III.

That upon the payment of said sum, and in consideration thereof, the defendant executed and delivered to plaintiff his certain contract in writing, wherein it was provided as follows:

“I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913 inclusive, in the City of Rampart, Alaska, and should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect should the said Julius Rahmstorf discontinue business before May 26, 1913.”

IV.

That on or about the day of June, 1912, the defendant M. P. Fleischman, disregarding his said agreement with plaintiff, opened a general merchandise store as managing clerk of the Miners Store in said town of Rampart, Territory of Alaska, near plaintiff's place of business, and began to and now is conducting a like business to that referred to in said agreement in writing.

V.

That by reason of the premises plaintiff has suffered damages in the sum of Two thousand dollars, no part of which sum has been paid to plaintiff by defendant.

VI.

That plaintiff ever since said 26th day of May, 1910, has been and now is continuing in the said general merchandise business purchased by him from defendant in the town of Rampart.

WHEREFORE plaintiff demands judgment against defendant for the sum of Two Thousand Dollars as liquidated damages, and for his costs and disbursements of this action.

G. B. ERWIN,

Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Fourth Division.—ss.

Julius Rahmstorf, being first duly sworn, on oath deposes and says: That he is the plaintiff above named, that he has read the foregoing com-

plaint, understands the contents thereof and that he believes the same to be true.

JULIUS RAHMSTORF.

Subscribed and sworn to before me this 11th day of January, 1913.

(Seal)

G. B. ERWIN,

A Notary Public in and for the
Territory of Alaska.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan. 13, 1913. C C. Page, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Summons.

The President of the United States of America,
Greeting:

To the Above Named Defendant.

YOU ARE HEREBY REQUIRED to appear in the District Court, in and for the Territory of Alaska, Fourth Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above named plaintiff, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will take judgment against you for the sum of two thousand dollars (\$2,000.00) and will apply to the Court for the relief demanded in said complaint.

WITNESS, the HONORABLE Frederic E. Fuller,
Judge of said Court, this 13th day of January in

the year of our Lord one thousand nine hundred and thirteen.

C. C. PAGE,
Clerk.

By P. R. WAGNER,
Deputy Clerk.

I hereby appoint S. A. Yantiss a Special Officer to make service of this Summons.

H. K. LOVE,
United States Marshal.

Marshal's Return.

United States of America,
Territory of Alaska,
Fourth Division.—ss.

I HEREBY CERTIFY, That I received the foregoing Summons on the 27th day of January, 1913, and that I duly served the same on the therein named defendant M. P. Fleischman at Rampart on the 27th day of January, 1913, by delivering a copy thereof to him personally, together with a copy of the complaint prepared and certified by G. B. Erwin the plaintiff's attorney.

Marshal's Fees \$6.00.

H. K. LOVE,
United States Marshal.

By S. A. YANCISS,
Special Officer.

(Indorsed) Filed Feb. 4th, 1913. C. C. Page, Clerk, By P. R. Wagner, Deputy Clerk.

[Title of Court and Cause.]

Answer.

Comes now the defendant, M. P. Fleischman and for answer to the complaint of Julius Rahmstorf on file herein, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs Nos. I and II of said complaint.

II.

For answer to paragraph No. III of said complaint, denies each and every allegation in said paragraph No. III contained and the whole thereof, except that defendant did on or about the first day of June, 1910, give to the plaintiff, at the plaintiff's request, a certain paper writing of which the seven lines quoted in said paragraph No. III is a part, as hereinafter alleged and not otherwise.

III.

For answer to paragraphs Nos. IV, V and VI of said complaint, denies each and every, all and singular, the allegations therein contained, and the whole thereof.

IV.

Denies each and every, all and singular, the allegations of said complaint and the whole thereof, except as hereinbefore specifically admitted.

And for a further separate and affirmative answer and defence to the complaint of the said Julius Rahmstorf on file herein, the defendant alleges:

said, the defendant, being without means or object in going to the States, decided to remain in said town of Rampart and there secure employment if possible; that on or about the 1st day of June, 1912, one F. J. Kalning opened a general merchandise store and business at said Rampart, and sought to employ the defendant as a clerk in the same; that defendant agreed to accept such employment provided the said Kalning would permit defendant to have the U. S. Post Office in said store and permit the defendant to conduct the same as postmaster, and to act as agent of the Victor Phonograph Co., outside his duties as such clerk; that the said Kalning agreed to such provision, and defendant accepted such clerkship at the wage of \$75.00 per month and board and since such date has continued in the employ of said F. J. Kalning as such clerk and as postmaster at Rampart as aforesaid, and not otherwise, (all of which plaintiff has at all of said times well known).

V.

That the defendant has never, since the sale to plaintiff of the business aforesaid, resigned as postmaster at Rampart, nor has he opened up, owned or conducted, except as hereinbefore alleged, any merchandise business whatever at said Rampart, Alaska, nor has he as Clerk of the said F. J. Kalning aforesaid sought to alienate or divert merchandise trade from the said Julius Rahmstorf except through the sale of superior articles by the said F. J. Kalning had and kept for sale, and through

legitimate competition of said Kalning store.

VI.

That the said pretended agreement for the sale of the good will of said business, being so made separate and apart from the sale of said merchandise store and business, and for reasons appearing on the face thereof, is without sufficient consideration and void.

WHEREFORE, the defendant having fully answered, prays to be hence dismissed without day, and that he have judgment for his costs and disbursements in this behalf expended together with such other and further relief as to law and justice may appertain.

L. R. GILLETTE,

Attorney for Defendant.

United States of America,
Fourth Division,
Territory of Alaska.—ss.

M. P. Fleischman, being first duly sworn, on oath deposes and says: I am the defendant in the above entitled cause; I have read the foregoing answer, know the contents thereof, and the matters and things therein alleged are true as I verily believe, save as to those matters alleged on information and belief, and those I believe to be true.

M. P. FLEISCHMAN.

Subscribed and sworn to before me this 18th day of June, 1913.

(Seal)

J. H. HUDGIN,
Commissioner and Ex-Officio Notary
Public in and for Alaska.

(Indorsed) Filed June 23, 1913. C. C. Page,
Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Amended Reply.

Comes now the plaintiff Julius Rahmstorf, and for Reply to the further and separate answer and defense of the defendant served and filed herein, admits, denies and alleges as follows:

I.

Replying to paragraph I thereof he admits all the matters and allegations contained therein, with the exception of the matters contained and enclosed in brackets, which said matters are denied; and further answering said paragraph I plaintiff alleges that on or about the 26th day of May, 1910, the defendant came to plaintiff and as an inducement of entering into negotiations for the sale of his business to plaintiff, informed plaintiff that he would leave Alaska and go outside and stay there, and before leaving Alaska he would turn over to plaintiff the Post Office then being conducted by him as well as the agency of the North American Transportation & Trading Company then held by him.

II.

Plaintiff denies that at the time of the sale aforesaid the wife of defendant was in Rampart, and

alleges that the wife of defendant at said time was somewhere in the states and that she returned to Rampart during the late summer or fall of the year 1910; admits that the defendant was employed by him as salesman in said store and that defendant continued in said employ until February or March, 1911, and that during said time defendant continued as Post Master at Rampart and kept the Post Office in said store.

III.

Plaintiff admits that on the 26th day of May, 1910, (not on or about the 1st day of June, 1910 as alleged by defendant) that defendant duly executed and delivered to plaintiff the paper writing referred to in paragraph III of his further separate and affirmative answer and defense, a true copy of which is as follows:

“For and in consideration of the sum of One “Dollar to me in hand paid by Julius Rahmstorf “of Rampart, Alaska, I, M. P. Fleischman of Ram- “part, Alaska, hereby agree to the following:

“That should I resign my position as Postmaster “of Rampart, Alaska, I will do so in favor of Julius “Rahmstorf providing he be eligible at the time of “my resignation.

“I also hereby agree and promise not to engage “in any way in the line of general merchandise for “the next three years, that is up to May 26, 1913 “inclusive, in the City of Rampart, Alaska, and “should I do so, I hereby promise to forfeit the “sum of Two Thousand Dollars. This last clause

I.

That on or about the 26th day of May, 1910, and for a long time prior thereto, defendant was the owner of and conducted a general merchandise store and business in the town of Rampart, Territory of Alaska, and that on said day the defendant for a consideration of about the sum of Eighteen Hundred Dollars (\$1,800.00) sold and delivered said merchandise store and business (not including the good will thereof, or the agency of the Victor Phonograph Co., which the defendant then had and still retains) including the stock of dry-goods, groceries, provisions, miners' supplies, etc., to the plaintiff Julius Rahmstorf.

II.

That at the time of the sale aforesaid the wife of defendant was seriously ill and defendant intended to take her to the States for treatment, but before such plan could be carried out the wife of defendant died; that for several months after the sale aforesaid, defendant at the request of plaintiff continued in charge of said merchandise store and business as managing clerk and salesman under pay of the plaintiff, to and until on or about the first day of September, 1910, and during all of said time defendant conducted the U. S. Post Office at Rampart in said store as Postmaster.

III.

That on or about the first day of June, 1910, the defendant gave to the said Rahmstorf a paper writing in words and figures in substance and effect,

as follows:

“For and in consideration of the sum of One Dollar, to me in hand paid by Julius Rahmstorf of Rampart Alaska, I, M. P. Fleischman of Rampart, Alaska, hereby agree to the following:

That should I at any time resign my position as Postmaster at Rampart, Alaska, I will do so in favor of the said Julius Rahmstorf providing he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause as to opening business shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913.

Signed in presence of

.....

.....

M. P. FLEISCHMAN.”

That the defendant has a copy of said paper writing and the foregoing is a full, true and correct copy thereof to defendant’s best knowledge and belief. That defendant signed said paper because of his intention to leave Alaska as aforesaid, and believing the same could not be enforced in any event.

IV.

That after the death of defendant’s wife as afore-

“shall have no effect, should the said Julius Rahm-
“storf discontinue business before May 26, 1913.

(Sgd) M. P. FLEISCHMAN.

“Signed in the presence of

(Sgd) F. J. KALNING.

“Dated at Rampart, Alaska, May 26, 1910.”

Further answering said paragraph III, plaintiff alleges that on said 26th day of May, 1910, this plaintiff paid to the defendant the purchase price of said stock of dry-goods, etc. agreed upon, and that said payment was the consideration received by the defendant for the sale of said merchandise store and business and the good will thereof and was the consideration for the defendant executing and delivering the agreement referred to; that plaintiff has no information and belief as to the intentions of the defendant, when he signed said paper, to leave Alaska, or as to the defendant believing the said agreement could not be enforced in any event, and therefore denies the same.

IV.

Plaintiff denies each and every allegation contained in paragraphs IV, V and VI of said further and separate answer and defense of the defendant.

WHEREFORE plaintiff asks for judgment as prayed for in his complaint.

G. B. ERWIN,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Fourth Division.—ss.

Julius Rahmstorf, being first duly sworn, on oath deposes and says: I am the plaintiff in the above entitled cause; I have read the foregoing reply, know the contents thereof, and that the same is true as I verily believe.

Subscribed and sworn to before me this day
of, 1913.

.....
A Notary Public in and for the
Territory of Alaska,
My Commission expires:

(Acknowledgement of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Nov. 1, 1913. Angus McBride, Clerk, By P. R. Wagner, Deputy.

Plaintiff's Exhibit "C."

DUPLICATE EXPENSE BILL

Pro. No. D 1630
Date 7-29-12

Manifest No 50

Trip 6

Boat Susie

M. P. Fleischman

To NORTHERN NAVIGATION COMPANY, Dr.

.....Station Date.....190.....

Destination Rampart

For Freight and Charges from Seattle

Marks	No. of Packages and Description of Articles	Feet Weight	Rate	Amount	Charges Advanced	Lighterage	Total
I Stp (2)	Talk. Mach.	98					
1 Bx	" " Parts	135	79.80	9.30		25	9.55

Total Collect

9.55

Consignor Sherman Clay & Co.

Received Above Freight in Good Order

Orig. Point and Date Ex Vict 41

M. P. Fleischman.

Per.....

Plaintiff's Exhibit "C."

DUPLICATE EXPENSE BILL

Pro. No.....

Date 8-3-12

Manifest No. 87

Trip 6

Bout St. Michael

To NORTHERN NAVIGATION COMPANY, Dr.

Date.....190....

.....Station

Fleischman

For Freight and Charges from Circle.

Destination Rampart

Marks	No. of Packages and Description of Articles	Feet Weight	Rate	Amount	Charges	Lighterage	Total
5 c	Eggs	290	22.80	3.31	Advanced		3.31

Collect

Flashman

Received Above Freight in Good Order

Consignor N. C. Co.

Per John Wiehl

Orig. Point and Date 8-3-12

Plaintiff's Exhibit "C."

NORTHERN NAVIGATION COMPANY.
RIVER—BILL OF LADING.

Shipped in apparent good order and condition by M. P. Fleischman on board the Northern Navigation Company's Steamer St. Michael (or any of the said Company's steamers, or steamers employed by them) whereof Looney is Master, now lying at the port of Rampart and bound for Dawson, the following described articles, contents and value unknown, to be transported to Victors Wood Camp and delivered in like good order and condition subject to conditions as printed on the back hereof, unto Frank Reinosky or to his or their assigns at Victors Wood Camp he or they paying charges for said freight at the rate on min per — to-gether with all such charges as shall have been advanced on same.

IN WITNESS WHEREOF, the Master, Clerk or Agent of said vessel hath affirmed to 3 Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.
Dated at Rampart this 14 day of Sept—12.

Marks	Packages	Description of Articles	Weight subject to Correction	Feet
	14	Talking Machines	37	
Address	14	Records	18	

\$1.00 prepaid

Triplicate.

Chas. Binkler.

Northern Navigation Company
per Julius Rahmstorf.

Accepted

M. P. Fleischman
J. R.

Shipper.

Triplicate.

Plaintiff's Exhibit "C."
DUPLICATE EXPENSE BILL

Pro. No.
Date 9-8-12

Manifest No. 181
TO NORTHERN NAVIGATION COMPANY, Dr.

Trip 18

Boat Delta

M. P. Fleischman

.....Station190....
For Freight and Charges from Dawson.

Destination Rampart

Marks No. of Packages and Description of Articles Feet Weight Rate Amount Charges Lighterage Total
Advanced

2 stps (3) Talk, Mach.
1 Bx Records

310 157.50 24.40 1.50 25.90

Collect

Received Above Freight in Good Order

M. P. Fleischman

Consignor White Pass

Per F. Kalning

Orig. Point and Date Dawson 9-8-12

(Indorsed) No. 1878. Plff's Ex. "C". Filed Jan 12, 1914. Angus McBride,
Clerk, by P. R. Wagner, Deputy.

Defendant's Exhibit "1."
ORIGINAL EXPENSE BILL

Pro. No.
Date 6-1 1912

Manifest No. 33

To NORTHERN NAVIGATION COMPANY, Dr.
Date 6-1-12

Boat Susie Trip 1
F. J. Kaining

Rampart Station
For Freight and Charges from Tanana.

Destination Rampart

Marks	No. of Packages and Description of Articles	Feet Weight	Rate	Amount	Charges	Lighterage	Total
							Advanced
No. 41	1 cs Catsup			58			
42	1 " Leaf Tobacco			58			
43	1 Cad " "			29			
44	1 cs. Oysters			52			
45	1 " Asst Fruit			65			
46	1 " Pears			65			
47-48	2 " Peaches			130			
49	1 " Apricots			65			
50	1 c Baked Beans			60			
51	1 sk Rope			80			
52	1 cs Candy			103			
53-55	3 sks Rice			150			
56-57	2 sks Beans			100			
58-59	2 gns Beans			200			
60	1 Ble Salt			150			
61-72	12 Sks Sugar			600			
73-84	12 Gns Flour			1200			

85	1	Ble Ro	Wheat	90			
86	1	" "	Oats	90			
87-92	6	Sk	Salt	300			
93	1	Bld Oars	(6) pcs Strip	12			
94	1	cs	Sweet Cresc.	52			
95	1	"	Pilot Bread	58			
96	1	Cad	Tobacco	13			
97-112	16	cs	Groc Repack	1107			
113	1	Bdl	Picks	28			
114	1	cs	Vinegar	90			
115	1	"	Groc Repack	29			
116	1	crt	Ham	118			
120	1	cs	Gro	57			
121-128	8	"	"	416	12.—	33.75	
15	1	"	Turks	61	18.—	.55	
117-118	2	"	Eggs	110	14.40	.80	
119	1	Cvt.	Showcase	114	24.—	1.37	
				<hr/>			
				5910		36.47	Collect
							36.47
				<hr/>			
				5910		36.47	Received Payment
							Julius Rahmstorf.
							Per.....

Consignor Rodman Alaska Trading Co.
 Orig. Point and Date Tanana 6-1-12

(Indorsed) No. 1878. Df's Ex. "1". Filed Jan 12, 1914. Angus McBride,
 Clerk by P. R. Wagner, Deputy.

Defendant's Exhibit "2."

ORIGINAL EXPENSE BILL

Pro. No.
Date 6-1-12

Manifest No. 28

Trip 1

To NORTHERN NAVIGATION COMPANY, Dr.

Date 6-1-12

Rampart Station

For Freight and Charges from Tanana

Charges Lighterage Total
Advanced

Boat Susie

F. J. Kalning

Destination Rampart

Marks No. of Packages and Description of Articles

Feet Weight Rate Amount

Marks	No. of Packages and Description of Articles	Feet Weight	Rate	Amount	Charges	Lighterage	Total
1 cs.	Crackers	No. 1		40			
1 "	Corn starch 2s	2		45			
2 "	Lard 3-4	3-4		130			
1 "	Cocoa 5s	5		15			
2 "	Bak Powder	6-7		40			
1 "	Mince Meat	8		27			
1 Bx	Evap Apples	9		57			
1 cs	Soups	10		49			
1 "	Raisins	11		38			
1 "	Roast Beef	12		27			
1 Crt	Bacon	14		145			
1 cs	Corn	13		27			
2 "	Tomatoes	16-17		130			
1 "	Stg Beans	18		45			
2 cs	Peas	19-20		90			
1 "	Sweet Potatoes	21		65			

2 "	Corn	22-23	90
1 "	Jelly	24	59
1 "	Butter	25	72
2 "	Ev Milk	26-27	126
1 "	Nap Soap	28	83
1 Co	Rope	29	58
1 Kg	Nails	30	112
1 Bld	Handles	31	21
2 "	Shovels	32-33	60
6 cs.	Carn Milk	34-39	390
1 "	L. C. Syrup	40	72
1 "	Repack Goods	No. 80	40
			<hr/>
			2153

40

—Over—

1 c Repack Groceries No. 129

Prepaid
on other ex bill

2153

40

Collect.

Prepaid

12.91

Consignor Rodman Alaska Trading Co.

Orig. Point and Date Tanana 6-1-12

Received Payment

Julius Rahmstorf

Per.....

(Indorsed) No. 1878. Def's Ex "2". Filed Jan 12, 1914. Angus McBride,
Clerk by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Demurrer & Motion for Judgment.

Comes now the defendant by L. R. Gillette, his attorney, and demurs to the reply of plaintiff to the answer on file herein, and for grounds of demurrer states:

I.

That the complaint herein as supplemented by said reply, does not state facts sufficient to constitute a cause of action or to entitle plaintiff to the relief demanded.

II.

That the court has no jurisdiction of the person of defendant or of the subject of the action.

III.

That the reply herein admits that the agreement sued upon is that set out in the affirmative answer of the defendant (save as to date thereof) and said agreement is void and of no effect because:

- a. It is without subject matter;
- b. It is without consideration;
- c. It is against public policy.

WHEREFORE, the premises considered, the defendant moves for judgment upon the pleadings for the dismissal of the action, and for his costs and disbursements herein.

L. R. GILLETTE,

Attorney for Defendant.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Nov 3, 1913. Angus McBride, Clerk.

[Title of Court and Cause.]

**Order Overruling Demurrer and Denying Motion
for Judgment on Pleadings.**

This matter having come on regularly for hearing upon defendant's demurrer to plaintiff's reply, and motion for judgment upon the pleadings, and having been submitted upon briefs of counsel, and the same having been duly considered,

IT IS ORDERED that the said demurrer be overruled and said motion denied.

Dated: December 8, 1913.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12 page 789.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Dec 8, 1913. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Judgment.

This cause having come on regularly for trial before the Court on the 12th day of January, 1914, the plaintiff appearing in person and by Guy B. Erwin, his attorney, and defendant appearing in person and by his attorney, L. R. Gillette, both parties in open court waiving trial by jury; and the court having heard and considered the evidence and proofs offered on behalf of the parties respectively, and the arguments and briefs of counsel, and having fully considered the same, and having heretofore made and signed its findings of fact and

conclusions of law in the premises and being now fully advised in the premises, NOW THEREFORE,

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the plaintiff Julius Rahmstorf do have and recover of the defendant, M. P. Fleischman, the sum of Two Thousand Dollars (\$2,000) damages, together with his costs and disbursements taxed at \$18.35, and that the plaintiff have execution therefor.

Done in open Court this 9th day of March, 1914.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12 page 874.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. March 9, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

General October 1913 Term. Saturday, March 7, 1914.

One hundred fourth Court Day.

Order Denying Motion for New Trial.

Now on this day, the motion of defendant for a new trial herein having heretofore been submitted to the Court for its decision, G. B. Erwin appearing in behalf of plaintiff and L. R. Gillette appearing in behalf of defendant; the Court being duly and fully advised in the premises,

IT IS ORDERED that the said motion be, and the same is hereby denied, and defendant is granted sixty (60) days within which to perfect an appeal of said cause.

Entered in Court Journal No. 12 page 873.

F. E. FULLER,
District Judge.

[Title of Court and Cause.]

Bill of Exceptions.

AND BE IT FURTHER REMEMBERED that thereafter and on the 12th day of January, 1914 at 10 o'clock A. M., said action came on regularly for trial before the above entitled court, a jury having been expressly waived by the parties; Guy B. Erwin, Esq., appearing as attorney for plaintiff and L. R. Gillette Esq., appearing as attorney for the defendant, whereupon the following testimony and evidence was taken and given and the following proceedings were had, to-wit:

Julius Rahmstorf, the plaintiff, being first duly sworn as a witness in his own behalf:

(By Mr. Gillette).

At this time we object to the taking of any evidence on behalf of the plaintiff under the allegations of the complaint and reply in this action, on the ground that the same are insufficient in law to entitle the plaintiff to the relief demanded or any relief, or to constitute a cause of action against the defendant.

(The Court).

The objection will be overruled. Exception.

WHEREUPON the trial proceeded, and witness Rahmstorf testified as follows:

DIRECT EXAMINATION.

(By Mr. Erwin).

My name is Julius Rahmstorf and I am plaintiff in this action. I reside at Rampart Alaska where I have been conducting a mercantile business since June 1899; I have known the defendant M. P. Fleischman since about 1899, at which time he was conducting a restaurant with a little merchandise counter at Rampart, and was also postmaster there—had no other business except mining; about May 1910 he was conducting a general merchandising store at Rampart.

About May 1910 I had some negotiations with defendant Fleischman. He appeared several times prior to that date in my store and made me a proposition to take over his general merchandise, stating he was going to leave the country if I was willing to buy him out. I at first refused, the conditions at Rampart not being very good. But he came around again and made me the further inducement that he was going to turn the post office over to me, provided I would be appointed of course, and also the agency of the N. A. T. & T. Company. So I considered it, and finally agreed to buy him out. It is impossible for me to state the exact date of this agreement, it may have been in April—it was prior to May. We agreed upon the amount—prices at which the goods should be taken over. I also told him, outside of the store building, in a case like this, he would have to make a contract that he was going to leave the country, or that he was not going

to conduct any business; which, of course, he said it was thoroughly understood that he was going to leave Alaska anyway. We then, on May 19th, commenced moving his stock to the building which I now occupy—I rented in the meantime from him—belonging to the N. A. T. & T. Company. He moved his stock in there any invoiced it, and ascertained the prices as near as we could, which occupied several days. Then on May 26th—I already told him before that I was willing to settle with him, to pay the purchase price—on May 26th I told him to have this agreement which we made before---

(Mr. Gillette): I object to that as not the best evidence—the agreement is in writing and they must produce it. (Objection overruled—exception.)

He then retired to the corner which he used as a postoffice in my own place, and on his own typewriter he drew up the agreement, and signed it, and witnessed it by F. J. Kalning.

After he handed me the signed agreement, I paid him the price of eighteen or nineteen hundred dollars—I dont remember exactly how much,—which closed the whole transaction. I have the original of that agreement in my possession.

(Mr. Erwin): I ask that this be admitted in evidence.

(Mr. Gillette): We object to that being received in evidence on the ground that it is irrelevant, incompetent and immaterial. It is not sufficient in law as a basis of an action of this kind. The pleadings show that it was not incident to the sale of

the business, but incident to the contract over the post-office—a separate agreement from the sale altogether, as testified to by this witness.

(The Court): I don't^{so} understand the testimony. (Objection overruled—exception. Whereupon said contract was received in evidence, marked Plaintiff's Exhibit A, and read into the record as follows):

“For and in consideration of the sum of one dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I, M. P. Fleischman hereby agree as follows: That should I resign my position as postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, provided he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of ~~general~~ general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the city of Rampart, Alaska; and, should I do so, I hereby promise to forfeit the sum of two thousand dollars. This last clause shall have no effect should said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN.

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910.”

I paid over some money after I had received this contract, and received from defendant a receipt for same. I got that receipt on the date it bears.

(Mr. Erwin): I now offer the receipt in evidence.

(Mr. Gillette): We object to it as irrelevant, incompetent and immaterial for the reasons heretofore stated. The contract is not one on its face that is enforceable. (Objection overruled—exception. The receipt was then received in evidence and marked Plaintiff's Exhibit B, and was read into the record as follows):

“Rampart Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dollars (\$1791.15) for a stock of merchandise, as payment in full.

M. P. FLEISCHMAN.”

Across one end of the check, in printing is “Julius Rahmstorf Rampart, Alaska.”

The stock of goods that I bought at that time consisted of a little of everything the line of general merchandise as needed in a mining camp, such as groceries, hardware, dry-goods, shoes, talking-machines—one or two,—one I guess, and some lumber. I still continue in business at Rampart, and have so continued without interruption since 1899.

Up until January 1, 1912 the defendant Fleischman had conducted his post-office in my store, and also had a home for his private use from me. All at once he concluded to move out of my place. His wife got sick. I believe for that reason he stated it was too cold; and he moved her to his own place in which he had a half interest, in Rampart, and was there before conducting his business, his store, also. He did not have a store there at that time. Soon after his wife did die, he commenced fixing the

place up, replacing shelves, counters, etc. Then, about the latter part of May, when the navigation opened, he went down to Tanana and did purchase a small stock of groceries from one W. B. Rodman. Those goods were landed in this house before mentioned, and it was opened up for his business, and he conducted and managed his business,—I judge this was in June 1912,—a general store, but in the main part it consisted of groceries only. I don't know that he had a man employed in this place, but there were friends around who assisted him. F. J. Kalning was around there. The store was named "The Miner's Store, and it is in existence today and has been running ever since June, 1912. They keep for sale general merchandise such as groceries, hardware, dry-goods etc., a similar stock to that which I handle.

Q. Have you been damaged by the fact that this store was opened up there?

(Mr. Gillette): We object to that as irrelevant, incompetent, immaterial, and calling for a conclusion of the witness. Let him state the facts.

Objection overruled. Defendant excepts.

I have been damaged—the sales decreased quite heavy, at least fifty per cent. I lost a good many customers. Fleischman the defendant is managing that store. Up until the fall I believe in 1912—I am not sure whether it was 1912 or 1913—F. J. Kalning was engaged in mining on Little Minook creek, and only was in the store on Sundays, and that time when Fleischman went down to Tanana

he was there probably for a week. But since the fall of 1912 he is there every day I should judge. I have seen him (Kalning) chopping wood, carrying water, delivering goods, and doing all sorts of work outside of the house.

CROSS EXAMINATION.

(By Mr. Gillette.)

It was about June 1st, 1912 that Fleischman bought the stock of goods. Those expense bills dated June 1, 1912 shown me by counsel, are the expense bills for that shipment of goods, are signed by me, and I received the money on them.

A year ago this winter especially, I did considerable business with the Miner's Store; Kalning went in that store to work in the fall of 1912 after the mining season closed. Fleischman claims Kalning owns the business known as the Miner's Store—Kalning never told me that he did and I never considered that he did. Those expense bills exhibited by counsel are made out by me—signed by me, and Kalning insisted that they be made out in his name always, as well as Fleischman at times.

Fleischman did always the business; from Kalning's actions he never did any business there at all so far as I am concerned, still he insisted that I should make out the bills to him and I did so. I made no objection, He might give me another name and I would make the bill out in another name. I cannot swear that Fleischman owns that business.

I never made out a bill in my life since the Miner's Store has been running, against Fleischman, except in some other connection, that I remember of. I have been in the Miner's Store occasionally to get my mail—I generally send somebody for it. The post-office is conducted by Fleischman in the back of the Miner's Store.

I have been damaged to a far greater extent than the sum stipulated in the agreement, through loss of trade. I never knew of Fleischman taking away any of my customers in a direct way. My complaint is that that store, to which I rendered bills as The Miners Store, has entered into competition with me and got a part of the trade in Rampart.

Q. You thought for a time you had everybody else shut out, didn't you?

A. I didn't think anything of the kind. If the N. C. would start to close up, and that would leave me alone, maybe another one would start up a store. If somebody else had entered into competition with me besides Kaining, they would have undoubtedly got part of the trade too.

As to just the date when the sale took place, as I recollect Fleischman commenced moving his stock on the 19th of May 1910; it took probably two or three days to move them. They were moved on the 19th, 20th and 21st of May; it is a question whether they were my goods as soon as they were moved into my store. In my opinion they were not until I paid for them. After they were moved there was a little lapse that we didn't do anything. It took

several days to go over them and ascertain the prices and figure them up.

I was supposed to get most of the goods at actual cost price, in which was included freight. There were other goods which were considered dead stock that I got at greatly reduced prices—such as hardware and dry-goods.

After I bought the Fleischman stock I hired him as clerk in my store; he worked for me until about November on a salary, and then got a spell and quit; then he started in again and that lasted until about February 1911 when he quit and stayed quit. I paid him his money and that was the end of it. I paid him a salary—I am not positive how much. He made me the same proposition—this proposition—stated that the Government gave him a certain amount for the post-office and if I would give him so much more, he would help me in the store—it was either seventy or seventy-five dollars.

Q. Did't Fleischman (about February 1911) criticise you for the way you ran your business?

A. He might have. I certainly criticized him in return.

Q. You have been criticizing him ever since, have'nt you?

A. I certainly do criticize him any time I have a chance to talk about him.

When Fleischman was working for me, it was understood from the beginning that he was not going to carry the water and cut the wood, and I

said I didn't want him to do it. He had to attend to the post-office—I had nothing to do with that whatever.

RE-DIRECT EXAMINATION.

(By Mr. Erwin): I am the agent of the Northern Navigation Company at Rampart. The duplicate expense bills from the Northern Navigation Co. handed me by counsel are made out in the name of M. P. Fleischman, Rampart Alaska. This additional paper handed me by counsel is a bill of lading issued by me as agent of the Northern Navigation Co. covering a shipment of talking machines and records. The expense bills cover (1) Str. "Delta" covering a shipment of talking machines and records; (2) Str. "Susie" also covering shipment of talking machines and parts; (3) Str. "St. Michael" covering a shipment of 5 cases of eggs from Circle, Alaska; (4) Str. "St. Michael" covering a quarter of beef from Gibbon I presume—it is left out. (Papers admitted and marked Plaintiff's Exhibit C.)

As to date when the sale of Fleischman's stock of goods was completed, I did not consider it completed until I paid over the money on May 26th. (Defendant moves to strike the answer as not responsive—overruled, exception.)

Q. Were the terms of this agreement, Plaintiff's Exhibit "A" discussed during the transaction?

(Mr. Gillette): We object as irrelevant, incompetent and immaterial. The agreement is in writing, and not ambiguous on its face. Objection overruled—exception.

A. They were thoroughly discussed by me outside of the building leaning on the fence before I entered into any agreement—before I entered into the agreement to take over the stock, and previous to the moving of the goods to my store.

RE-CROSS EXAMINATION.

(By Mr. Gillette.)

The inventory as it was made up did not include an agency for talking machines. I collected the freight and delivered the goods represented by the expense bills in evidence, and while I bought one or two talking machines from Fleischman I didn't know that he had the agency for them until some time afterwards. I don't know whether corrected expense bills were afterwards made out to F. J. Kalning for the items in evidence in the name of Fleischman.

M. P. FLEISCHMAN, witness called on behalf of plaintiff and first duly sworn, testified on

DIRECT EXAMINATION.

(By Mr. Erwin.)

My name is M. P. Fleischman, I am defendant in this action and have resided at Rampart Alaska since the spring of 1898. I now have the postoffice at Rampart and am clerking for F. J. Kalning; have been clerking for him since June 1, 1912—goods are billed sometimes to "F. J. Kalning" and sometimes the "Miner's Store,"—it is known as the Miner's Store. I have been employed in Kalning's store continuously since June 1, 1912 until May 26, 1913 and after.

CROSS EXAMINATION.

(By Mr. Gillette.)

Kalning pays me \$75.00 a month and board; both of us keep the books. The book handed me by counsel is Kalning's blotter cash book.

Q. I will ask you to look on the second page under June 30th there, and see what the second entry there under June 30th, I think it is, there?

(Mr. Erwin): I object, as not proper cross-examination.

(Objection sustained. Defendant excepts.)

Motion of plaintiff for judgment on the pleadings had on the case as presented, denied.

PLAINTIFF RESTS.

(Mr. Gillette): We now move for judgment on the pleadings and the evidence, on the ground that the plaintiff has entirely failed to prove his case, for the reason (1) the evidence of plaintiff shows that the agreement, Plaintiff's Exhibit A was induced by the proviso therein as to the postoffice at Rampart Alaska and the promise of the agency of the N. A. T. & T. Company, and not by the sale of the Fleischman stock of merchandise; (2), further that the contract for the purchase of the Fleischman stock was consummated some time in April, 1910 but before May 1910, and the said agreement of May 26, 1910 was therefore separate and apart from said sale and on a separate consideration; (3) that even if said agreement of May 26, 1910 be considered valid and binding, the evidence fails to show that the defendant has violated the same, and

(4) while plaintiff testifies he has been damaged in his business from June 1, 1912 to May 26, 1913 for more than the amount specified in said agreement of May 26, 1910 there is no evidence to show of what such damage consists, or what amount of business the plaintiff did prior and subsequent to said alleged breach, or that any loss of business claimed was attributable to the acts of the defendant.

(The Court): (After argument.) I will deny the motion now, and you may renew it at the close of the case. Defendant excepts.

DEFENSE.

JULIUS RAHMSTORF called as a witness for defendant and theretofore duly sworn, testified on

DIRECT EXAMINATION.

(By Mr. Gillette.)

I should judge I did about \$20,000 general merchandise business in the year 1912, (1911) and paid \$50.00 license, as far as I remember in 1912—the record will show.

Q. What merchandise license did you pay for the year 1912?

(Mr. Erwin): Objected to as irrelevant and immaterial.

(The Court): Sustained. He is not being tried for failure to pay a proper license fee.

(Mr. Gillette): That is true, but he alleges that he lost so much money in a certain number of months in the way of damages, and have't I a

right to show by his testimony that he paid only a license on less than \$10,000 merchandise.

(The Court): I think that is a collateral matter. He is not up here for cross-examination now.

(Mr. Gillette): Cannot a defendant (party) himself be called to rebut his own testimony in chief?

(The Court): Certainly. But he is then made a witness for the party who calls him, and the examination has to proceed the same. If he is a hostile witness, you can put leading questions.

(Mr. Gillette): We except. I will withdraw this witness and call the clerk.

(The Court): I cannot see that it is competent testimony in any phase of the case. It might be, on cross-examination of Mr. Rahmstorf, to discredit his testimony. But the fact that he didn't pay a certain amount of license fee is not evidence that he didn't do a certain amount of business.

(Mr. Gillette): This is a damage suit,—

(The Court): It is an action for damages, and the damages are fixed by the terms of the contract.

(Mr. Gillette): Does the Court hold that the plaintiff must not show damages, even under that contract?

(The Court): I think, if plaintiff is entitled to damages, that they are fixed by that contract.

(Mr. Gillette): We except. I will call the clerk.

PAUL R. WAGNER, witness called on behalf
of defendant and first duly sworn testified on

DIRECT EXAMINATION.

(By Mr. Gillette.)

My name is Paul R. Wagner; I am deputy clerk of this court, and as such have the custody of the records respecting the payment of merchandise licenses.

As such officer I have in my possession and custody a merchandise license of F. J. Kalning beginning June 1st, 1912 and also for the year 1913.

— — — — —

The defendant then offered to prove that F. J. Kalning applied for and obtained merchandise license under the laws of Alaska beginning June 1st, 1912 for 1912 and also for 1913 and up to the date of the trial for his store at Rampart, which offer was denied and defendant excepted.

The defendant then offered in evidence the merchandise license applications of Julius Rahmstorf for his store at Rampart Alaska for the years beginning August 27, 1911 and August 27, 1912, in which Rahmstorf swears in both instances that he is doing a business at Rampart of over \$10,000 and less than \$20,000, and for which he paid both years \$50.00 to the Clerk of the District Court under the law, which offer was by the Court denied, and defendant excepted.

M. P. FLEISCHMAN, defendant being called as a witness in his own behalf and first duly sworn, testified on.

DIRECT EXAMINATION.

(By Mr. Gillette.)

My name is M. P. Fleischman, I am defendant in this action, have resided at Rampart Alaska since the spring of 1898 and up to about May 20th, 1910 there conducted the postoffice and a general merchandise store. After May 20th, 1910 I started clerking for Julius Rahmstorf beginning the 26th, and clerked for him four or five or six months, after which I had just the postoffice up to June 1, 1912. In the summer of 1911 I had the postoffice and took a trip to the Iditarod where I was interested in mining; on returning I lived with my wife at Rampart until she died January 30th, 1912. Between February and June 1, 1912 I was doing nothing except run the postoffice.

I sold out my merchandise stock in 1910 to Julius Rahmstorf.

In connection with that stock of goods I had the agency for the Victor Phonograph and for the North American Transportation and Trading Co, neither of which agencies were conveyed with said stock of goods. As soon as I sold to Rahmstorf about May 20th, 1910 we started to take inventory and move the stock about May 21st, the day the sale was made.

Q. After the 21st day of May, 1910 whose stock of goods was that?

(Mr. Erwin): We object to that as incompetent, irrelevant and immaterial, depending upon a conclusion of the witness.

Objection sustained. Defendant excepts.

We finished taking inventory about May 25th,

1910; the inventory was being taken as the goods were moved. I was paid for the stock on the basis of what the inventory figured up. The sale to Rahmstorf included the general merchandise that was in my store. I worked for Rahmstorf on a salary, ^{as a clerk} had the use of a home next to the store, and room for my postoffice in his store. During that time I still acted as agent for the North American Trading & Transportation Co., and collected rent from Rahmstorf for his store building on behalf of that corporation; I continued as agent for said corporation until about a year ago. I started to collect rent from Rahmstorf on May 26th, 1910, on which date I think we finished the inventory and figured up what was coming to me on the stock of goods sold to Rahmstorf.

I signed the contract in evidence as Plaintiff's Exhibit A.

Q. State the circumstances under which you signed that and for what purpose?

(Mr. Erwin): Objected to—it shows on its face what the purpose was.

(The Court): Sustained as to that part of the question. Defendant excepts.

Mr. Rahmstorf asked me on the 26th of May, or after that—I dont remember just when it was—if I would have any objection to making such an agreement. I told him no; that I did'nt think I would ever go into business again, I figured on going outside. But my wife took sick and died, and on that account I remained in the country. After we

had that talk I signed the agreement—on or after the 26th of May, 1910. After the sale to Rahmstorf I never opened up any business in Rampart—have been clerking for F. J. Kalning.

I purchased the goods represented by expense bills defendant's Exhibits 1 and 2 of Rodman, for F. J. Kalning. Kalning sent me down to get them, and he paid for them. Kalning opened up his store in Rampart Alaska, June 1, 1912 in the building where I kept the post-office, and has continued and is continuing said business ever since. I am working for him as clerk on a salary, with the privilege of living in the building. In addition to my salary I have what is coming to me from the post-office.

The book handed me by counsel is the blotter cash book of F. J. Kalning, Rampart store. It is kept partly by myself and partly by Kalning—we both make entries in it, and that book is kept in the ordinary course of business.

Defendant offers in evidence the monthly entries in said book covering salary of M. P. Fleischman—objection to same as incompetent sustained. Defendant excepts.

My salary is paid me monthly in cash or gold-dust, and an entry made of the samè as of that day's proceedings.

I secured corrected expense bills in the name of F. J. Kalning for those offered by the plaintiff made out in my name, they were so made at my request; except for the talking machines which was

my own business.

In the conduct of that business (Miner's Store or F. J. Kalning) over there, I never endeavored to draw off any of the trade or customers of Julius Rahmstorf. The Kalning store, during especially the first year of its existence, did business with the Rahmstorf store in the name of the Kalning or Miner's store.

(Mr. Gillette): The suit was brought January 11, 1913 and we will show—we offer to show by this witness that Kalning's store did several thousand dollars worth of business with the Rahmstorf store to about that time, and after that that they have not done very much.

Objected to—objection sustained. Defendant excepts.

The circumstances with reference to my signing the contract Plaintiff's Exhibit A were: I think it was the 26th of May. Not before this; it might have been after, after the goods were all sold to Mr. Rahmstorf. Mr. Rahmstorf asked me if I would have any objection to giving him an agreement that I would not enter into business any more for three years. I told him "No; I will give you that agreement. I am not going in business any more." This was all done in the store. There was nothing ever spoken about an agreement before the 26th of May. It was made up after the 26th, after the goods were sold and in Mr. Rahmstorf's possession. I wrote the agreement, and Mr. Rahmstorf read it before I signed it. Before the agree-

ment was written out we had a conversation about the post-office. Mr. Rahmstorf was at that time postmaster at Eureka, and I agreed if I should ever leave the town of Rampart, that if he were eligible for that position of course that would be up to the Department to appoint him or not as they felt about it. I would recommend him, or turn the postoffice over to him. In other words, he wanted to keep the postoffice in his store; I would consider the postoffice at Rampart a drawing card in the mercantile business.

At the time I signed the contract I intended to go outside with my wife; she died January 30, 1912. I have never resigned as postmaster at Rampart. I have never since the 26th day of May, 1910, owned or conducted, except as a clerk for hire, any mercantile business whatever in Rampart. I do not think of anything else that I have not testified to, that is material to the case.

CROSS EXAMINATION.

(By Mr. Erwin.)

My wife was outside at the time this agreement was entered into, but she was to come back that summer. I wrote that agreement (Plaintiff's Exhibit A) on the typewriter, with Mr. Rahmstorf's assistance. When I sold to Rahmstorf one talking machine was included in the sale, and I think I said something to him about retaining the agency for talking machines although I am not clear on that. I didn't put it in the agreement because I could not sell an agency. I did no talking machine

business while in Rahmstorf's store.

I have stated in my answer that I did not believe that contract could be enforced in any event, but if I had read the answer over more carefully I would not have allowed that sentence to be in the answer. The answer was sent to me at Rampart to be verified and I crossed out parts of it and left that sentence in; but it was all done in a hurry—I had to get it off in the mail that left the same day it was received. I signed the verification and swore to it before U. S. Commissioner Hudgin. At the time I signed the agreement, I never thought of the question whether it could be enforced or not.

I kept a very accurate system of books and papers for F. J. Kalning while I was clerking for him. I was careful that any little item billed to myself was corrected in each case, because I had heard that Mr. Rahmstorf threatened to bring suit against me. I was careful that no article should be charged to me, except perhaps talking machines.

Sometimes I ordered the goods for Kalning's store, and sometimes he did; I did some of the corresponding and Kalning did some; I signed Kalning's name to the correspondence, by myself when I did the writing.

I did not open up any business at Rampart; I went to Tanana and ordered the goods—Kalning was not along. Kalning was in Rampart when the store was opened, and remained there a few days and went to the creeks; he was then back and forth probably once a week, or once in two weeks. He

took part in running the store during that time—looked over the books and would attend to any customer who would come in while he was there. I had full supervisin of the store when he was not there, as clerk.

The building in which Kalning's store is situated is the postoffice building, of which I am half owner and Dr. Hudgin is half owner. I have charged up rent of that store for Dr. Hudgin's half, and still charge it. Kalning and myself kept the books. I did not generally supervise the ordering of goods; sometimes I ordered them and sometimes Kalning did, and I sold goods out of the store for Kalning. I was not the only one who transacted business for Kalning in his absence; there would be other people in the store who would wait on customers, and they would have the care and custody of the business while they were there. I had the care, custody and management of the store only as clerk; I took care of the business in Kalning's absence the same as I did when I was clerking for Rahmstorf.

I had conducted a merchandise business at Rampart for many years prior to selling to Rahmstorf; the Miner's Store is about 500 feet from where Rahmstorf keeps his store. I am selling in the Miners Store the same kind of goods Rahmstorf is selling, except liquors.

RE-DIRECT EXAMINATION.

(By Mr. Gillette.)

At the time I signed that contract I did not

think Rahmstorf could compel me to turn the post-office over to him. Either Kalning or myself collect for the Miner's Store, depending on which is there at the time.

Kalning ceased active mining operations some time in September, 1912, after which he let them out on a lease, and has been actively engaged in running the store practically all the time since. Bills due the store are never made out in my favor; the accounts run to the Miner's Store as a rule, sometimes F. J. Kalning.

Q. I will ask you to state whether your acts, in your working for the Kalning store as you have testified, ever in any manner damaged the plaintiff in this action?

(Mr. Erwin): We object to that as calling for a conclusion of the witness, which is a matter for the court to determine.

Objection sustained. Defendant excepts.

I have always heard indirectly that Rahmstorf was complaining about my connection with the store, ever since Kalning opened it up; he never complained to me personally.

RE-CROSS EXAMINATION.

(By Mr. Erwin):

It all depends on the season, whether the Miner's Store enjoys a good business or not.

W .B. BALLOU, called as witness for defendant, being first duly sworn testified on

DIRECT EXAMINATION

(By Mr. Gillette.)

My name is W. B. Ballou; I live at Rampart, have lived there since 1898; I know Julius Rahmstorf, M. P. Fleischman and F. J. Kalning since they have been in Rampart. I am by occupation a miner, am mining on Hunter Creek. F. J. Kalning is in the mercantile business at Rampart, having his store in the postoffice building where Mr. Fleischman is postmaster—it is known as the Miner's Store. I trade both at that store and at Julius Rahmstorf's. Kalning started in the mercantile business two years ago in the summer sometime.

Q. Did Mr. Fleischman ever try to prevent you from trading at Rahmstorf's?

(Mr. Erwin): Objected to as incompetent and irrelevant.

(The Court): There has been no evidence that he has been doing that.

Objection sustained. Defendant excepts.

CROSS EXAMINATION.

(By Mr. Erwin.)

When the people of Rampart refer to this store, I have always heard it referred to as the Miner's Store; often we say "up at Fleischman's." When trading with that store I did business with both Fleischman and Kalning, whoever was there—whichever I dealt with fixed the prices; whoever I was dealing with told me what the prices of the goods were. I dont think there was ever any discussion when the matter of prices was put up from one of them to the other.

JOHN W. DUNCAN, witness called on behalf

of defendant and first duly sworn testified on

DIRECT EXAMINATION.

(By Mr. Gillette.)

I have lived in Rampart fourteen years and know F. J. Kalning. (Letter from Mr. Marion, Tanana Alaska, to witness exhibited by counsel and objected to)

(Mr. Gillette): I have not offered it yet. I doubt that it is material, although it might be on the question of damages, but as the court does not consider that that enters into the matter, I will not —(interrupted)

(Mr. Erwin): I cannot see how that letter from Marion to this man could be material.

(Mr. Gillette): It might show how Rahmstorf stood among business men.

(The Court): I do not think that is a proper way to show it, although I dont know what the letter refers to.

I do most of my dealing in Rampart with the Miner's Store—just little odds and ends—I get my outfit from the outside. I have not dealt with Rahmstorf in the last year, but did prior to that. In the last year I have been against Rahmstorf's liquor license, but that is the only difference of opinion we have had. Fleischman never tried to get me to quit trading with Rahmstorf. I was in Rampart when the Kalning store was opened up, but know nothing of the private business of Kalning.

CROSS EXAMINATION.

(By Mr. Erwin.)

By the people at Rampart and myself, the Miner's Store is generally referred to as the post-office; the telephone call is the postoffice. We call the store the postoffice—"Where are you going?" "I am going to the postoffice,"—that means the Miner's Store. I cant say whether they ever say "Fleischman's store," but I know it is referred to as the postoffice.

DEFENDANT RESTS.

JULIUS RAHMSTORF called in rebuttal testified on

DIRECT EXAMINATION.

(By Mr. Erwin.)

I have had telephone communications with Fleischman as to orders for goods from me, or when I was buying from him—with reference to all sorts of groceries—staple articles, in regard to quantities or prices.

Q. What conversation would you have with him over prices for instance?

(Mr. Gillette): We object as incompetent and immaterial.

Objection overruled. Exception.

He always took the lead in accepting prices, and he accepted it or declined it without consulting Kalning in any way. At other times he sent Kalning over with a order written in his own handwriting, as a rule, to get certain articles. When the articles were not on hand or the prices not right, Kalning went back at times to consult Fleischman whether to bring it or not; and on several occasions he also

talked with him over the 'phone, from my store, to get his permission, or his view, or idea. He was putting the matter up to Fleischman for his opinion.

CROSS EXAMINATION.

(By Mr. Gillette.)

I do not remember that Fleischman has ever consulted Kalning. I do not know that Kalning was talking with Fleischman over the phone, but he rang up and there is no other one in the store—I must infer that Fleischman is on the other end of the line—it might undoubtedly have been somebody else.

(Mr. Erwin): If the Court please, I would like to amend my complaint to conform to the proofs in this case. I ask to amend paragraph 4 thereof, by inserting in that paragraph at the end, "as managing clerk of the Miners Store at Rampart."

(Mr. Gillette): We object to that. It changes the whole nature of their case. They come in here and alleged that defendant has opened up a general merchandise store in the town of Rampart in plaintiff's place of business, and began to and now is conducting a like business to that referred to in said agreement in writing. If he changes the character of the employment—that may be permitted in an equity case, but in a law case I think it is never permitted, except where it does not change the issues.

(The Court): I do not see that it would particularly change the issues here. . . . I dont see that the defendant's testimony would have been any

different. . . . The amendment may be made and the clerk may make the amendment.

Defendant allowed an exception.

PLAINTIFF RESTS.

(Mr. Gillette): Before the argument proceeds, I wish to renew the motion made at the close of plaintiff's case in chief, although I think a demurrer to the evidence is obsolete in our practice.

Motion overruled. Exception.

Whereupon said action was submitted to the court upon arguments and briefs of the respective counsel to be presented at a later date.

AND BE IT FURTHER REMEMBERED that thereafter, and within the time allowed by law the defendant presented to the court special findings verdict and judgment in said action based upon the pleadings and testimony and evidence in said matter, in words and figures as follows:

[Title of Court and Cause.]

Defendants Proposed Findings & Conclusions.

(Comes now the defendant, and moves the court to make and enter the following findings of fact and conclusions of law herein:)

"This matter having come on regularly for trial before the above entitled court on the 12th day of January, 1914, Guy B. Erwin Esq., appearing for plaintiff and L. R. Gillette Esq., appearing for the defendant, and the defendant objecting to the taking of testimony on behalf of the plaintiff or at all on the grounds and for the reason heretofore urged to the complaint and said reply, said objection

is overruled, to which ruling of the court defendant excepts and exception is allowed; thereupon, the parties respectively waiving a jury herein, and the court having heard the evidence and proofs offered on behalf of the plaintiff, the defendant moves for judgment of dismissal, with costs, for the reasons stated in the record herein, which motion is by the court denied, defendant excepts and exception is allowed; thereupon the court heard the evidence and proofs of the defendant and of the plaintiff and the same and all thereof having thereafter been submitted to the court for its decision and the court having considered the same together with the briefs and arguments of the parties respectively, and being now fully advised in the premises, the court finds the following facts:

FINDINGS OF FACTS:

I. That on and for some time prior to the 20th day May, 1910 the defendant M. P. Fleischman owned and conducted a general merchandise store and business in the town of Rampart, Fourth Division, Territory of Alaska, and was on said day the owner of a stock of dry-goods, groceries, provisions etc. used by him in his said business.

II. That on said 20th day of May, 1910 defendant sold to the plaintiff Julius Rahmstorf his said stock of dry-goods, groceries, provisions etc. and the good-will of said business and immediately thereafter and before the 26th day of May 1910 delivered the same to the plaintiff, and upon the said 26th day of May 1910 the plaintiff paid to de-

defendant the full consideration therefor, to-wit, the sum of \$1791.15.

III. That thereupon and thereafter and up until about the month of January, 1911 the defendant entered into and remained in the employ of the said plaintiff as clerk in the plaintiff's store and place of business in said Rampart, on wages, and during said time defendant was the U. S. Postmaster at said Rampart and conducted said post-office in the plaintiff's place of business while so clerking for plaintiff.

IV. That said post-office was a valuable adjunct and agency in the bringing of trade to the said store and place of business of the plaintiff.

V. That on the said 26th day of May, 1910 and after the sale of the said merchandise business by defendant to plaintiff, at the request of plaintiff the defendant made and delivered to plaintiff a written agreement in words and figures as follows:

"For and in consideration of the sum of One Dollar to me in hand paid by Julius Rahmstorf of Rampart Alaska, I, M. P. Fleischman of Rampart Alaska, hereby agree to the following:

That should I resign my position as Postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf providing he be eligible at the time of my resignation.

I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913, inclusive, in the city of Rampart, Alaska, and

should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN.

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910.”

That the said agreement was given with the view and understanding that defendant was then intending to leave Alaska because of the illness of his wife, but the wife of defendant thereafter and on or about the month of February 1911 (1912) died, and the defendant for that reason remained in said Rampart, Alaska.

VI. That on or about the month of January 1911 the defendant left the employ of the plaintiff as clerk, but did not resign his position as post-master of said Rampart, and moved said post-office from the building of said plaintiff to a building owned in part by defendant and in part by one J. H. Hudgin in said Rampart, Alaska, where he has since conducted the same.

VII. That on or about June 1, 1912 one F. J. Kalning of Rampart Alaska, employed the defendant to go to Tanana Alaska and there purchase a stock of dry-goods, groceries, provisions etc., giving the defendant the money to make such purchase, and the defendant did select and purchase for the said Kalning such stock. That thereafter the said F. J. Kalning opened up a general mer-

chandise business on his own credit and account in the building so occupied by defendant with the U. S. Post Office, which said premises the said F. J. Kalning has since rented of the defendant and said J. H. Hudgin for that purpose.

VIII. That since on or about said June 1, 1912 the said F. J. Kalning has conducted said merchandise business at the premises aforesaid.

IX. That on or about said June 1, 1912, and soon after the defendant returned from said Tanana as aforesaid, the said F. J. Kalning sought to employ the defendant as a clerk in his said store, and defendant agreed to do so provided the said Kalning would permit the defendant to retain said U. S. Post Office in said building and conduct and attend the same as postmaster; that the said Kalning agreed to said terms, and to pay the plaintiff the sum of \$75.00 per month and board for such service, and the defendant has continued in such employ as incidental to his duties as such postmaster, ever since said date.

X. That in such employ as clerk for said F. J. Kalning, the defendant has never used or permitted to be used his own name or credit in connection with such business of F. J. Kalning known as the "Miner's Store," nor has he in any manner sought to draw off the customers of the said plaintiff, but on the contrary has expressly refrained from so doing.

XI. That while the defendant did not consider the agreement referred to in Finding No.

V binding upon him after he determined to remain in Alaska and keep his said postoffice position, he has in no manner violated the terms thereof by his employment as aforesaid.

XII. That the plaintiff has not been damaged in any sum whatsoever by the conduct of the defendant in his said employment with said "Miner's Store," or at all.

CONCLUSIONS OF LAW.

As conclusions of law based on the foregoing facts, the court finds as follows:

I. That the agreement sued upon herein and set out in finding of fact No. V, is without legal effect and void.

II. This action should be dismissed.

And

III. The defendant is entitled to judgment against the plaintiff for his costs and disbursements in this behalf expended.

.....
District Judge.

Dated at Fairbanks Alaska, this January.....
1914.

(Acknowledgement of due service attached.)

[Title of Court and Cause.]

Judgment.

This cause having come on regularly for trial before the court on the 12th day of January, 1914, the plaintiff appearing in person and by Guy B. Erwin his attorney and defendant appearing in person and by his attorney L. R. Gillette, both

parties in open court waiving trial by jury; and the court having heard and considered the evidence and proofs offered on behalf of the parties respectively, and the arguments and briefs of counsel, and having fully considered the same, and having heretofore made and signed its findings of fact and conclusions of law in the premises and being now fully advised in the premises, NOW THEREFORE

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the plaintiff take nothing by his said action and that the same be and is hereby dismissed, and that the defendant have his costs and disbursements herein expended in the sum of \$..... and execution therefor.

Done in open court this January..... 1914.

.....
District Judge.

AND BE IT FURTHER REMEMBERED, that thereafter and over the objection of the defendant, in words and figures as follows:

[Title of Court and Cause.]

Objections to Plaintiff' Proposed Findings of Fact & Conclusions of Law.

Comes now the defendant M. P. Fleischman and objects to the court making the findings of fact and conclusions of law submitted by the plaintiff herein, and as grounds of objection states:

FINDINGS OF FACT.

I. Proposed findings of fact numbered I, II and III are against the law and the evidence in

this case, because the evidence shows the said sale to have been consummated on May 20, 1910 for the sum of \$1791.15, and the said agreement on its face shows that it was and is a separate transaction, upon a separate and distinct consideration and subject matter (if any) and has nothing to do with the sale of said business and the good will thereof.

2. Proposed finding of fact Numbered IV is against the law and the evidence in this case, for the reason that the evidence shows that defendant did not, at the time alleged in the complaint or at any other time after said sale, open or conduct, either as manager, managing clerk or otherwise, a merchandise business at said town of Rampart Alaska, in violation of said agreement or otherwise, or at all; and said agreement being void in law for want of legal subject matter or consideration, said finding is incompetent, irrelevant and immaterial.

3. Proposed finding of fact Numbered V is against the law and the evidence in this case, for the reason that the evidence shows (1), that the defendant has not since said June 1st, 1912 opened and conducted a line of merchandise at said Rampart Alaska, either as manager, managing clerk or otherwise as alleged in the complaint, or in violation of said agreement, or at all; and (2) there is no evidence in the case showing or tending to show that plaintiff has been damaged in the sum of two thousand dollars, or any other sum, or at all, by reason of the defendant clerking in the store of F. J. Kalning as shown by the evidence.

4. Proposed finding of fact numbered VI is incompetent, irrelevant and immaterial on the grounds and for the reasons hereinbefore stated.

5. The proposed findings of fact are, as a whole, against the law and the evidence in this case for the reasons (1) that the contract or agreement therein referred to is of no binding and legal force and effect, and is void; (2) that even though the same be held legally binding, there is no evidence in the case to show that the defendant has ever violated the terms thereof; and (3) that even though there were evidence to show or tending to show that the defendant had violated the terms thereof by clerking for the said F. J. Kalning "Miner's Store" as shown by the evidence, the plaintiff, having alleged damages therefrom, has wholly failed in the proof of damage by reason of the defendants acts, or at all.

CONCLUSIONS OF LAW.

Defendant objects to the signing, making or entering of plaintiff's proposed conclusions of law numbered I, II, III, IV, and V on the grounds and for the reasons hereinbefore set out, and on the further ground that each and every thereof are against the law and the evidence in this case.

L. R. GILLETTE,

Attorney for Plaintiff,

(Acknowledgment of service attached.)

the Court approved, made, and entered findings and verdict in favor of the plaintiff and against the defendant, in words and figures as follows:

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This matter having come on regularly for trial before the above entitled court on the 12th day of January, 1914, Guy B. Erwin appearing for the plaintiff and L. R. Gillette appearing for the defendant, both parties waiving a jury; and the court having heard the evidence and proofs offered on behalf of the said plaintiff and defendant respectively, and the records and papers in said cause, and the said cause being submitted to the court for its decision and the court having considered the same, and the briefs and arguments of said attorneys, now finds the following facts:

FINDINGS OF FACT.

I.

That on or about the 26th day of May, 1910, and for a long time prior thereto, defendant above named owned and conducted a general merchandise store and business in the town of Rampart, Fourth Division, Territory of Alaska, and was on said day the owner of a stock of dry-goods, groceries, provisions &c used by him in his said business.

II.

That on said 26th day of May, 1910, defendant sold to plaintiff his said stock of dry-goods, groceries, provisions &c and the good-will of the said business for the consideration of \$1791.15.

III.

That on the said 26th day of May, 1910, in consideration of the sale of his business aforesaid, and

as a part of said transaction, the defendant executed and delivered to plaintiff his certain contract in writing, in the words and figures as follows, to-wit:

“For and in consideration of the sum of One Dollar to me in hand paid by Julius Rahmstorf of Rampart Alaska, I, M. P. Fleischman of Rampart, Alaska, hereby agree to the following:

That should I resign my position as Postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf providing he be eligible at the time of my resignation.

I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN,

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910.”

IV.

That on or about the 1st day of June, 1912, the defendant in violation of his said agreement with plaintiff, entered into and engaged in the line of general merchandise and carried on said business in the capacity of manager and managing clerk of a general merchandise store known as the “Miner’s Store,” in the town of Rampart, Territory of Alas-

ka, near plaintiff's place of business, being a like business to that referred to in said agreement in writing; and that defendant continued in said business from the 1st day of June, 1912 to the 26th day of May 1913, and after said date.

V.

That by reason of the defendant entering into and engaging in the line of general merchandise and carrying on same in the capacity of manager and managing clerk as aforesaid, the plaintiff has been damaged in the sum of Two Thousand Dollars, no part of which sum has been paid to plaintiff by defendant.

VI.

That plaintiff ever since said 26th day of May, 1910, has been and now is continuing in said general merchandise business purchased by him from defendant in the town of Rampart, Alaska.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts, the court finds:

I.

That the agreement entered into by defendant on the 26th day of May, 1910, a copy of which is set out in the III finding of facts above, was a good, valid and legal agreement, based upon a sufficient consideration, and enforceable at law.

II.

That the acts of defendant in entering into and engaging in the line of general merchandise and carrying on said business in the capacity of man-

ager and managing clerk of the general merchandise store known as the "Miner's Store" at Rampart Alaska, from the 1st day of June, 1912 to the 26th day of May, 1913 was a violation and breach of said agreement, and entitles the plaintiff to damages.

III.

That the defendant having agreed to and inserted in the agreement the sum to be forfeited by him in the event of a breach thereof should be construed and is construed as liquidated damages; and that no proof of actual damages upon the part of the plaintiff was necessary in this case.

IV.

That the violation and breach of the agreement by defendant damaged the plaintiff to the extent of Two Thousand Dollars.

V.

That by reason of the foregoing facts the plaintiff is entitled to recover judgment against the defendant in the sum of Two Thousand Dollars, together with his costs and disbursements.

Dated: January 24, 1914.

F. E. FULLER,
District Judge.

(Acknowledgment of service attached.)

AND BE IT FURTHER REMEMBERED that thereafter, and within the time allowed by law, the defendant filed his motion for a new trial of said action, in words and figures as follows, to-wit:

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant and moves the court now here to set aside its findings and decision heretofore made and entered in favor of the plaintiff and against the defendant and to grant a new trial herein, and as grounds of motion states:

I.

The evidence in this action is insufficient to justify the verdict, findings and decision of the court made and entered herein, in that:

(a) The evidence shows that the stock of goods, wares and merchandise sold by defendant to plaintiff on May 20, 1910 was sold upon inventory at cost price, to-wit, the sum of \$1791.15 which was paid to the defendant on May 26, 1910, and if said sale included also the good-will of said business the same was without consideration, and there is no evidence in the case to the contrary.

(b) The evidence shows the sale alleged to have been made, to have been consummated on the said 19th or 20th day of May, 1910; that the agreement signed by the defendant on or about the 26th day of May, 1910 and upon which this action is based does not carry with it the good-will of the business so sold and disposed of by defendant to plaintiff nor import any consideration therefor, but on the contrary shows that said agreement is and was independent of the sale and transfer of said stock of goods and business by defendant to plaintiff, upon a separate and distinct subject-matter and

consideration (if any), and was made conditional upon the defendant turning over the U. S. Post Office at Rampart Alaska to plaintiff in the event the defendant resigned therefrom and left Alaska, neither of which contingencies happened nor was the defendant under any obligation to carry out or perform either of them.

(c) The evidence does not show or tend to show that the acts of the defendant in clerking in the store of F. J. Kalning as shown by the evidence, in any manner damaged or interfered with the business of the plaintiff subsequent to said sale of May 20th, 1910; but on the contrary the evidence shows that the defendant was within his rights as a citizen in accepting employment with the said F. J. Kalning as shown by the evidence.

(d) There is no evidence to show that the defendant opened and conducted any merchandise business whatsoever subsequent to the sale of said business by the defendant to plaintiff on May 20, 1910; but on the contrary the evidence shows that said F. J. Kalning opened and conducted said merchandise business known as the "Miner's Store" at Rampart Alaska on or about June 1, 1912 and has since owned and conducted the same, and that defendant accepted employment as a clerk in said store upon a salary and during his said employment he has not used his own name or credit nor sought to draw off the customers of plaintiff but has expressly refrained from so doing.

(e) There is no evidence in the case to show that

the defendant was ever manager or managing clerk of said F. J. Kalning business or "Miner's Store," nor that as such, or at all, have the acts of the defendant in any wise prejudiced or damaged the business of plaintiff.

(f) The evidence in this case shows that the good-will of the business sold by defendant to plaintiff on May 20, 1910 did not pass to the plaintiff until some time in the year 1912 when plaintiff secured the agency of the North American Trading & Transportation Company, and that until that time the plaintiff was a tenant of the said company of which the defendant up until that time was agent and collected rents from the plaintiff.

(g) The evidence shows that at the time defendant sold said business to the plaintiff, defendant was the agent for and conducting his business as successor of the said North American Trading & Transportation Company, and had no authority to sell and did not sell the good-will of said corporation to the plaintiff, and the name and good-will of said corporation and the agency thereof came to the plaintiff some time in the year 1912 and not prior thereto.

II.

Certain errors of law occurred at the trial of this cause, to which the defendant excepted to, as follows:

1. The court erred in permitting the plaintiff to offer any testimony in said cause under the pleadings herein, for the reason that defendant was and

is entitled to judgment on the pleadings.

2. The court erred in denying the defendant's motion at the conclusion of the plaintiff's case in chief to dismiss the plaintiff's case for failure of proof of the matters and things alleged in the complaint and reply of the plaintiff.

3. The court erred in sustaining plaintiff's objections to testimony offered on behalf of the defendant showing or tending to show that plaintiff had sustained no damage by reason of the acts of the defendant in accepting employment and engaging as clerk for the said F. J. Kalning in the said "Miner's Store" at Rampart Alaska between June 1, 1912 and the time of the trial.

4. The court erred in holding that the said contract or agreement of May 26, 1910 was a valid and binding contract upon a sufficient consideration and for a lawful purpose.

5. The court erred in overruling the objections of the defendant to the proposed findings of fact and conclusions of law of the plaintiff herein, and in making and entering said findings and conclusions of the plaintiff.

L. R. GILLETTE,

Attorney for Defendant.

(Acknowledgment of service attached.)

AND BE IT FURTHER REMEMBERED that thereafter the matter of said motion for new trial came on for argument by the respective counsel of the parties, after which argument had the following proceedings were had and the court rendered

its oral opinion, in words and figures as follows:
[Title of Court and Cause.]

Opinion of Court On Motion for New Trial.

FULLER, DISTRICT JUDGE: (Orally)—In the case of Rahmstorf against Fleischman on motion of the defendant for a new trial, I have considered the authorities presented. The matters were practically all argued at length and passed upon at a previous stage in the trial, except the contention of the defendant that the contract sued upon provided for a penalty, rather than for compensation for damages or liquidated damages. That wasn't considered at any length before.

But I am inclined to take the view that I did at the trial: That this is a matter in which the parties themselves had fixed upon the amount of the damages. It is true, as contended by Fleischman, that the word "Forfeit" in the contract would ordinarily indicate penalty rather than liquidated damages; but the courts hold universally at the present time that the language used in such a contract is not controlling; that the court will look at the whole contract and the purposes for which it was entered into for its meaning, rather than to the language used by the parties.

It seems to me that the contract in this case shows that the intention of the parties was a sale of the stock of goods, and that Fleischman should not enter into business in competition with the purchaser in any way for three years—if he did so, that it was the intention that this sum of two

thousand dollars should be the amount of damages that he should pay.

Undoubtedly, some of the authorities cited by the defendant sustain his contention, and in some of the States I have'n't any doubt that this contract would be regarded as a contract for penalty rather than for liquidated damages; but from the authorities in the State of Washington and, I think, the Supreme Court of the United States, it can reasonably be inferred that where the parties had freely contracted in regard to the matter and agreed that the amount specified should be considered as liquidated damages, the courts will consider it so rather than to go beyond the contract and construe it as penalty and permit them to prove actual damages.

The matter is considered at considerable length in the case of *Sun Printing & Publishing Co. v. Moore* (183 U. S. 642; 46 L. Ed., 366), the opinion in which is by our present Chief Justice of the United States and which, in fact, I think overrules a great many of the prior decisions. In that case it is said the courts should not attempt to make contracts themselves, when the parties have, for a fair consideration and dealing at arms' length, made a contract themselves. It seems to me this contract in question was entered into without any duress or restraint on either side, and that the parties have contracted what the damages should be. I don't see any reason why the contract as they made it should not be carried out.

Even if this contract should be construed as containing provisions for penalty rather than liquidated damages, the result might not have been different because, as testified by the plaintiff, the damages he actually sustained exceeded this amount. Of course the testimony was limited, so that the truth of this statement was'nt admitted, and the cross-examination was restricted on that point. There would have been error, of course, if the contrary rule had prevailed—I mean if it were true the contract was for penalty rather than liquidated damages. But, as I say, the result might not have been different even if evidence had been admitted to that effect.

The motion for new trial is denied.

(By Mr. Gillette: For defendant.) The court will allow us an exception to its ruling.

(The Court): An exception will be allowed.

(Mr. Gillette): We would like now to have sixty days within which to file bill of exceptions and prepare our papers on appeal. I presume that will not be objected to.

(Mr. Erwin. For plaintiff): No, we have no objection to giving the defendant a reasonable time of course.

AND BE IT FURTHER REMEMBERED, that thereafter, and over the objection and exception of the defendant, the Court made and entered judgment against the defendant in favor of the plaintiff.

ORDER ALLOWING AND SETTLING BILL
OF EXCEPTIONS.

And now on this 23 day of May, A. D., 1914, the defendant having heretofore served notice on the adverse party of his intention to present for settlement and allowance his bill of exceptions herein as a basis for writ of error, and the same now being filed and presented, the plaintiff appearing by Guy B. Erwin his attorney and the defendant appearing by L. R. Gillette his attorney, and the parties respectively being heard upon the same, and the court being fully advised,

IT IS THEREFORE ORDERED that the foregoing 45 pages of written and typewritten matter be and the same is hereby allowed and settled as a true bill of exceptions herein, and the same be and is hereby approved and certified as such and made of record in said cause and ordered to be filed with the Clerk of this Court.

Done in open court at Fairbanks Alaska, this 23d day of May, A. D., 1914.

F. E. FULLER,

Judge of the District Court,
4th Division of Alaska.

(Entered in Court Journal No. 12 page 933.)

(Indorsed) Received Clerk of the Court Office
May 8, 1914, Angus McBride, Clerk.

Filed May 23rd, 1914. Angus McBride, Clerk, by
P. R. Wagner, Deputy.

[Title of Court and Cause.]

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit:

Comes now the above named defendant by his attorney, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in the said District Court for the Territory of Alaska, Fourth Judicial Division in favor of the above named plaintiff and against the above named defendant on the 9th day of March, A. D., 1914, manifest error hath happened to the great damage of the said defendant.

WHEREFORE the said defendant prays for the allowance of a writ of error herein, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and process as may cause the same to be corrected by the said District Court for the Territory of Alaska, Fourth Judicial Division.

Dated this 5th day of January, A. D., 1914.

L. R. GILLETTE,

Attorney for Defendant.

United States of America,
Fourth Division,
Territory of Alaska.—ss.

L. R. Gillette, being first duly sworn on oath deposes and says:

I am attorney for the defendant named in the

above and foregoing Petition for Writ of Error, and as such conducted the trial and all proceedings in said district court on behalf of said defendant among which is the signing of the foregoing Petition;

That, as affiant is informed by said defendant and believes and so alleges, not until on or about the 15th day of November, 1914 was the said defendant financially able to proceed with his said appeal and pay counsel fees and costs incident thereto, whereupon he notified affiant to perfect said appeal or writ and prosecute the same to effect; that such notice was received by telegram from Rampart Alaska, and there being then no judge for the foregoing entitled court, the judge who tried said cause and settled the bill of exceptions having resigned his said position, affiant waited a reasonable time to ascertain whether a successor would be appointed by the President to succeed said judge resigned in time to perfect said writ; that an appointment has been made for such vacancy, but at the date of making this affidavit affiant is not advised that the appointee has been confirmed or qualified, and even if he had it would be impossible for affiant on behalf of his said client to perfect said writ within the year allowed for the same, because of various statutory notice of terms of court and other formalities which might intervene to cut off defendant's rights by lapse of time; that defendant has duly filed in the Lower Court his Assignment of Errors. Wherefore affiant prays

as in the petition.

L. R. GILLETTE,

SUBSCRIBED in my presence and sworn to before me this 5th day of January, 1915.

C. C. HEID,

Notary Public for Alaska.

My commission expires Oct. 21, 1917.

United States of America,

Territory of Alaska

Fourth Judicial Division.—ss.

I hereby certify the within and foregoing constitutes a full, true and correct copy of the original Petition for Writ of Error on file (or to be filed) in the said entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE,

Attorney for Deft.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div Jan 5, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Writ of Error.

United States of America.—ss.

The President of the United States of America to the Honorable Charles E. Bunnell the Judge of the United States District Court for the Territory of Alaska, Fourth Judicial Division: Greeting—

Because in the record and proceedings, as also

in the rendition of the judgment of a plea which is in the said District Court, before you, between Julius Rahmstorf, plaintiff, and M. P. Fleischman, defendant, manifest error hath happened to the great prejudice and damage of the said defendant, M. P. Fleischman, as is said and appears by the petition herein,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties in this behalf, do command you if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco and State of California, together with this writ, so as to have the same at the said place in said circuit on the fourth (4th) day of February, 1915, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness, THE HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 5th day of January, A. D. one thousand nine hundred fifteen.

Attest my hand and Seal of the United States District Court for the Territory of Alaska Fourth Judicial Division, at the Clerk's office at Fair-

banks, on the day and year last above written.

(Court) ANGUS McBRIDE,
(Seal) Clerk District Court, for the
Territory of Alaska,
Fourth Division.

United States of America,
Territory of Alaska,
Fourth Judicial Division.—ss.

I hereby certify that the within and foregoing constitutes a full, true and correct copy of the Writ of Error on file (or to be filed and issued) in the within entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE,
Atty. for Defendant and one
of Attys. for Plff, in Error.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 5, 1915. Angus McBride, Clerk.

[Title of Court and Cause.]

Order Allowing Writ of Error.

And now on this 25th day of January, A. D., 1915 it appearing to the Judge of the above entitled court that on the 5th day of January 1915 and during the vacancy of the bench of said court the defendant in error, in pursuance of his bill of exceptions theretofore duly settled and filed a notice of suing out writ of error herein, filed in said court and cause his petition for writ of error accompanied

by an assignment of errors, and thereafter and on said day caused writ and citation to issue under the teste of the Clerk of this court in pursuance of which the record is now being printed at Fairbanks under rule of this court, for presentation of said cause on writ of error to the U. S. Circuit Court of Appeals for the Ninth Judicial Circuit; and further that said citation being made returnable within thirty (30) days of the issuance thereof to-wit on February 4th, 1915 which will not permit of return being made to said writ, it is necessary that the defendant in error have a further extension of time within which to present his record to the said Circuit Court, and counsel for plaintiff being present and consenting to the form of said order but reserving all objections & exceptions to the substance of said proceedings.

IT IS ORDERED that writ and citation issue herein as of said January 5th, 1915 and that the said defendant as plaintiff in error have an extension of thirty (30) days from said February 4th, 1915, within which to perfect said writ of error and make return to the same.

DONE IN CHAMBERS at Fairbanks Alaska, this January 25th 1915.

CHARLES E. BUNNELL,

Judge.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 25, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Assignments of Errors.

Comes now the defendant, and files the following Assignment of Errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause from the judgment made and entered by this honorable court on the 9th day of March, A. D., 1914 in the above entitled cause.

I.

That the District Court for the Territory of Alaska, Fourth Judicial Division, erred in overruling the demurrer of the defendant and plaintiff in error to the original complaint and reply filed in said cause.

II.

That the said court erred in denying the motion of defendant and plaintiff in error for judgment upon the pleadings as settled in said cause.

III.

That the said court erred in permitting the plaintiff (defendant in error) to introduce evidence in support of his said complaint and reply, because the same are insufficient in law to entitle said plaintiff (defendant in error) to the relief demanded or any relief, or to constitute a cause of action against the defendant (plaintiff in error.)

IV.

That the said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the purported contract or agreement marked "Plaintiff's Exhibit A," as follows:

"For and in consideration of the sum of one

dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I, M. P. Fleischman hereby agree as follows. That should I resign my position as postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, provided he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the city of Rampart, Alaska; and, should I do so, I hereby promise to forfeit the sum of two thousand dollars. This last clause shall have no effect should said Julius Rahmstorf discontinue business before May 26, 1913.

M. P. FLEISCHMAN.

Signed in the presence of

F. J. KALNING.

Dated at Rampart, Alaska, May 26, 1910."

over the objection of the defendant (plaintiff in error) that the same was irrelevant, incompetent, and immaterial, not sufficient in law as a basis of an action of this kind, and because the pleadings show that it was not incident to the sale of the business or stock of merchandise by Fleischman to Rahmstorf, but incident to a contract over the post-office—a separate agreement from the sale altogether as testified to by said Rahmstorf.

V.

The said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the receipt marked "Plaintiff's Exhibit

B," as follows:

"Rampart Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dollars (\$1791.15) for a stock of merchandise, as payment in full.

M. P. FLEISCHMAN."

over the objection of the defendant (plaintiff in error) as set forth in Assignment of Error IV.

VI.

The said court erred in permitting the said Julius Rahmstorf to testify generally as to damages in answer to the following question of his counsel: "Q. Have you been damaged by the fact that this store was opened up there?" (Meaning the Miner's Store of F. J. Kalning wherein said Fleischman was employed as clerk in said Rampart Alaska from and after about June 1, 1912, which said employment constitutes the sole alleged breach of said agreement of May 26, 1910); over the objection of counsel for defendant below that the same was irrelevant, incompetent and immaterial and called for the conclusion of the witness, and said witness should be required to state the facts from which the court could reach a conclusion, on the question of damages.

VII.

The said court erred in permitting the said Julius Rahmstorf to testify as to matters outside the expressed substance of said claimed agreement "Plaintiff's Exhibit A," in answer to the following question of his counsel as follows: "Q. Were the terms

of this agreement, Plaintiff's Exhibit A discussed during the transaction?" over the objection of the defendant that the same was irrelevant, incompetent and immaterial, the agreement declared upon being in writing and not ambiguous upon its face.

VIII.

The said court erred in denying the motion of the defendant below, made at the point when the plaintiff below had rested his case in chief, for judgment in favor of said defendant upon the pleadings and the evidence then before the said court, on the ground generally that said plaintiff had entirely failed to prove his case, for the reasons (1) that the evidence of said plaintiff shows that the agreement, Plaintiff's Exhibit A was induced by the proviso therein as to the post-office at Rampart Alaska and the promise of the agency of the N. A. T. & T. Company, and not by the sale of the Fleischman stock of merchandise; (2), further that the contract for the purchase of the Fleischman stock was consummated some time in April, 1910 but before May, 1910, and the said agreement of May 26, 1910 was therefore separate and apart from said sale and on a separate consideration; (3) that even if said agreement of May 26, 1910 be considered valid and binding, the evidence fails to show that the defendant has violated the same, and (4) while plaintiff testifies he has been damaged in his business from June 1, 1912 to May 26, 1913 for more than the amount specified in said agreement of May 26, 1910 there is no evidence to show of what

such damage consists, or what amount of business the plaintiff did prior and subsequent to said alleged breach, or that any loss of business claimed was attributable to the acts of the said defendant.

IX.

The said court erred in its decision, upon the motion mentioned in Assignment No. VIII, by which the defendant was compelled to introduce evidence after failure of proof on the part of the said plaintiff.

X.

The said court erred in sustaining the objection of the plaintiff below propounded by the said defendant to the witness Julius Rahmstorf when called as a witness on behalf of the said defendant, as follows: "Q. What merchandise license did you pay for the year 1912?" said witness already having testified that he paid such license under the laws of Alaska for the year 1911 on the basis of from \$10,000 to \$20,000 annual business, and the purpose of said question being to show by the answer of said witness that he paid said Alaska license on his said business at Rampart for the year 1912 and 1913 at the same rate as for 1911, showing that it was untrue that said plaintiff had been damaged by the alleged acts of the defendant.

XI.

The said court further erred, in connection with the error last before assigned, in ruling and deciding upon the right of the parties as to the introduction of evidence, as follows:

“(Mr. Gillette): This is a damage suit,—

(The Court): It is an action for damages, and the damages are fixed by the terms of the contract.

(Mr. Gillette): Does the Court hold that the plaintiff must not show damages, even under that contract?

(The Court): I think, if the plaintiff is entitled to damages, that they are fixed by that contract,” to which said decision the defendant below then and there excepted.

XII.

The said court erred in excluding from evidence and denying the offer of defendant below to prove, (a) that the merchandise licenses required under the laws of Alaska for the Miner’s Store at Rampart Alaska (the store in which Fleischman was employed as clerk which constitutes the sole alleged ground of breach of said contract Plaintiff’s Exhibit A) for the years June 1, 1912 to and including the year 1913 and to the date of the trial in 1914 were paid for and taken out in the name of F. J. Kalning, as proving or tending to prove the issue on behalf of said defendant; and (b) that the merchandise licenses required under the laws of Alaska for the years 1911, 1912 and to the time of said trial for the store of said Julius Rahmstorf at Rampart Alaska, which business is the alleged object of the damages claimed, were taken out and paid for by said Rahmstorf at the same statutory schedule rate after the alleged damage as before,

which proves or tends to prove that it is not true as testified by said Rahmstorf that his business decreased fifty per cent or more after Fleischman began clerking in said Miner's store.

XIII.

The said court erred in excluding the evidence called for by, and in sustaining the objection of the plaintiff below to the following question propounded to the said defendant while on the stand in his own behalf, as follows:

"Q. I will ask you to state whether your acts, in your working for the Kalning store as you have testified, ever in any manner damaged the plaintiff in this action?

(Mr. Erwin): We object to that as calling for a conclusion of the witness, which is a matter for the court to determine," and especially was such ruling error since the court had, over the objection of said defendant, permitted said plaintiff to state generally and without producing the best evidence in the way of books of account &c, that the acts of said Fleischman in clerking in the Miner's Store had damaged him (Rahmstorf) in more than fifty per cent. of his sales.

XIV.

The said court erred in permitting plaintiff below, at the conclusion of the evidence, to amend paragraph four of his complaint by inserting at the end thereof the words "as managing clerk of the Miners Store at Rampart," over the objection of the said defendant that such amendment so

changed the issues as to constitute a violation of the laws of Alaska relating to amendments of pleadings, and to injure the substantial rights of the defendant.

XV.

The said court erred in overruling the motion of the said defendant made at the conclusion of the evidence, for judgment upon the pleadings and the evidence then before the court.

XVI.

The said court erred in refusing to make and enter in said court and cause, the special findings, conclusions and judgment propounded on behalf of said defendant.

XVII.

The said court erred in overruling the objections of the said defendant to the proposed findings, conclusions on behalf of said plaintiff and against said defendant, and in making and entering the same, for the reasons set forth in said objections of defendant and others appearing upon the face of the proceedings.

XVIII.

The said court erred in its decision and ruling upon the motion for a new trial made by the said defendant (which said decision is set forth at length in the record herein), and especially holding thereby, on the question reserved for argument after trial, that the said contract "Plaintiff's Exhibit A" provided for measured or liquidated damages instead as for penalty as therein provided, and

in entering judgment for the plaintiff below for the sum of \$2000.00 damages without any proof thereof or opportunity on behalf of said defendant to show to the contrary.

WEREFORE, the said errors being to the substantial injury and detriment of the defendant below, he prays that the judgment be reversed &c.

L. R. GILLETTE,

Attorney for Defendant and
Plaintiff in Error.

United States of America,
Territory of Alaska,
Fourth Judicial Division.—ss.

I hereby certify the within and foregoing constitutes a full, true and correct copy of the original Assignment of Errors on file (or to be filed) in the said entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE,

Attorney for Defendant.

(Acknowledgment of due service attached.)

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 5, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Citation on Writ of Error.

The United States of America.—ss.

The President of the United States to the above named plaintiff Julius Rahmstorf, and to Guy B. Erwin, his attorney: Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in the State of California on the fourth day of February next ensuing and within thirty (30) days of the date of this writ, pursuant to a writ of error filed in the office of the Clerk of the above entitled court, wherein M. P. Fleischman is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS, the HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 5th day of January, A. D. 1915, and of the Independence of the United States of America the one hundred and thirty-ninth.

Attest:

ANGUS McBRIDE.

Clerk of the United States District Court
Territory of Alaska, Fourth Division.

(Court)

(Seal)

United States of America,
Territory of Alaska
Fourth Judicial Division.—ss.

I hereby certify the within and foregoing constitutes a full, true and correct copy of the original Citation on Writ of Error on file (or to be filed) in the said entitled court and cause.

Dated at Fairbanks, Alaska, this 5th day of January, 1915.

L. R. GILLETTE.

Attorney for Defendant.

(Acknowledgment of due service attached.)

[Title of Court and Cause.]

Bond on Writ of Error.

KNOWN ALL MEN BY THESE PRESENTS that we, M. P. Fleischman as principal, and Chas. Swanson and W. B. Ballou as sureties, are held and firmly bound unto Julius Rahmstorf plaintiff above named, in the sum of Five Hundred Dollars (\$500.00) to be paid to the said Rahmstorf, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our executors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 16 day of January, 1915.

Whereas, the above defendant M. P. Fleischman has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause made and entered therein on March 9, 1914 in favor of said plaintiff and against the defendant; NOW THEREFORE, the condition of this obligation is such that if the above named M. P. Fleischman shall prosecute said writ to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; other-

wise to remain in full force and virtue.

M. P. FLEISCHMAN

Principal.

CHAS. SWANSON

W. B. BALLOU

Sureties.

United States of America,

Fourth Division,

Territory of Alaska.—ss.

Chas. Swanson and W. B. Ballou of Rampart Alaska, sureties in the above and foregoing undertaking, being first duly sworn, on oath each for himself and not one for the other, deposes and says:

I am a resident of the Territory of Alaska; I am not a counselor, attorney, clerk, marshal or other officer of any court, and I am worth the sum of \$500.00 specified in said undertaking over and above all just debts and liabilities, and exclusive of property exempt from execution.

CHAS. SWANSON

W. B. BALLOU

Subscribed in my presence and sworn to before me this 16th day of January, A. D., 1915.

(Seal)

GEO. W. LEDGER,

United States Commissioner.

O. K. as to form and amount.

GUY B. ERWIN,

Attorney for Plaintiff and

Defendant in Error.

The within Bond is hereby approved this 26th

day of January, 1915.

CHARLES E. BUNNELL.

District Judge.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div. Jan 26, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

Clerk's Certificate to Record:

United States of America,
Territory of Alaska,
Fourth Division.—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 95 pages, numbered from 1 to 95 inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 1878, entitled: Julius Rahmstorf, Plaintiff, vs. M. P. Fleischman, Defendant, wherein M. P. Fleischman is Plaintiff in Error and Julius Rahmstorf is Defendant in Error, and was made pursuant to and in accordance with the praecept of the Plaintiff in Error, filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith; and I further certify that this transcript of record was printed under and by virtue of and in compliance with a "Rule for Printing Records on Appeal or Writ of Error," made by this Court on the 21st day of March, 1914, and that said transcript of record was indexed by me pursuant to said rule, and that the index thereof, consisting of pages i to iii, is

a correct index of said transcript of record; also that the costs of preparing said transcript and this certificate, amounting to twenty-nine dollars and seventy cents (\$29.70), has been paid to me by counsel for Plaintiff in Error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court, this 5th day of February, 1915.

(Court)

(Seal)

ANGUS McBRIDE,
Clerk District Court,
Territory of Alaska,
Fourth Division.